United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4111

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4111

JORGE ANTONIO MELARA-ESQUIVEL,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys,
Of Counsel.

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Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Jorge Antonio Melara-Esquivel (the "petitioner," "Melara," "alien") petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on March 26, 1976. That order dismissed the petitioner's appeal from the order of Immigration Judge Aaron I. Maltin finding the alien deportable under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2) in that he entered the United States without inspection and in violation of the immigration laws. On April 26, 1976 the alien filed this petition for review of the Board's decision. As in the civil administrative proceedings below the alien alleges that his initial interrogation by the Immigration and Naturalization Service (the "Service")

was in violation of the Fourth Amendment and therefore all the evidence introduced by the Service before Judge Maltin should have been suppressed under the theory that it constituted the fruit of the poisonous tree. As in the deportation proceedings below the alien seeks to have any deportation proceeding terminated on the theory that an alleged Fourth Amendment violation occurred when the alien's illegal presence first became known to the Service. Since the filing of this petition for review Melara has enjoyed the automatic statutory stay of deportation provided by Section 106(a) of the Act, 8 U.S.C. § 1105a(a).

Issues Presented

1. Was the alien given a fair and impartial hearing in the deportation proceedings below.

2. Whether the Board of Immigration Appeals, after reviewing Melara's previous history of immigration violations, abused its discretion in denying the alien the discretionary privilege of voluntary departure.

Statement of the Facts

Jorge Antonio Melara-Esquivel is a twenty-four year old native and citizen of El Salvador who entered the United States on or about January 20, 1974 across the United States-Mexican international border near San Ysidro, California. He paid $400. to arrange the illegal entry and thereafter was illegally transported to the United States. Since the time of his entry the alien has been illegally residing and working in the United States in violation of the immigration laws.

Upon his apprehension the Service commenced deportation proceedings with the issuance of an Order to

Show Cause and Notice of Hearing dated April 7, 1975 (R. p. 74).* This order charged that Melara was not a citizen or national of the United States but rather a native and citizen of El Salvador who entered the United States without inspection on or about January 20, 1974. The order further charged that he was subject to deportation under Section 241(a)(2) of the Act.

At the commencement of the deportation hearing before Judge Maitin on April 25, 1975 the alien identified himself as "Jorge Antonio Melara"; acknowledged that he had received a copy of the Order to Show Cause; and stated that he understood the nature of the deportation proceedings as well as the charges that were lodged against him (R. p. 46, A-7).** Thereafter Melara, by his counsel, refused to concede any allegations relating to his deportability. He further refused to testify before the Immigration Judge as to either his alienage or deportability, asserting the privilege against self-incrimination of the Fifth Amendment to the United States Constitution, thereby putting the Service to its proof of the allegations contained in the Order to Show Cause. The alien then moved for a separate suppression hearing and for the suppression of any statements or documents which may have been taken from him at the time of his arrest. His motion for a separate suppression hearing was denied by the Immigration Judge who also noted that the admissibility of any evidence presented by the Service could be dealt with when any such material was offered into evidence.

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* References preceded by the letters "R" are to the pages of the Certified Administrative Record previously filed with the Court.

** References preceded by the letter "A" are to the appendix filed by the petitioner.

The Service Trial Attorney subsequently introduced into evidence, over the objection of Melara's counsel, various documents relating to the petitioner. These documents included: (1) an official Service Form I-94 bearing the same name as that by which the petitioner had identified himself at the commencement of the hearing, Jorge Antonio Melara (R. p. 75); (2) a previous decision and order of deportation dated August 2, 1972 relating to the petitioner and bearing the same name as the petitioner (R. p. 76); (3) a previous order to show cause relating to the petitioner bearing his name (R. p. 77); (4) a Service fingerprint chart dated July 19, 1972 taken in connection with the previous deportation proceeding which bore the same name as the petitioner, as well as, his signature which appears identical to that on the petitioner's affidavit in support of his motion to suppress dated April, 1975 (R. p. 78); (5) Service Form I-214 relating to the petitioner's previous deportation proceedings and bearing his signature which appears identical to that in the petitioner's affidavit dated April 1975 (R. p. 79); (6) an airline ticket for "Jorge A. Melara" for passage to San Salvador (R. p. 84); (7) Service Form G-146 relating to Jorge Antonio Melara and countersigned by the American Vice Counsul in El Salvador relating to the petitioner's return to that country after his previous illegal sojourn in the United States (R. p. 85); (8) Service Form I-210 relating to Jorge A. Melara dated August 30, 1972 relating to the previous deportation proceedings (R. p. 86). All of these documents are official Service records which came from the Service files and were obviously not obtained from the respondent in connection with his arrest. In fact, these records existed in the Service's files prior to Melara's apprehension by the Service on April 7, 1975. The Immigration Judge overruled counsel's objections to the admission of these records on the ground that the alien's name appeared on all the forms and that he did not deny that they related to him.

The petitioner, on advice of counsel, did testify that the signature on the affidavit in support of the motion to suppress was his and further testified in part concerning his initial contact with the Service on April 7, 1975, when an immigration officer approached him for street directions and subsequently, after identifying himself, queried Melara as to his nationality. According to Melara's testimony he admitted that he was from El Salvador and that he was not in possession of immigration papers. The alien also testified that prior to the time the Service officer placed him in the officer's car, Melara had also told the Service officer that he came to the United States through Mexico a year prior to that date (A. 16-19).

Although he had advised his client to answer the questions of the Service's attorney Melara's counsel subsequently renewed his motion to suppress all statements made by the respondent to immigration officers following his arrest and those which were elicited from the alien orally by the Service's attorney at the deportation hearing. Melara's counsel also moved to terminate the deportation proceeding on the ground that the evidence introduced by the Service, "although properly obtained," (A. 20) should not be linked with Melara and should be suppressed because of an allegedly unlawful street interrogation. The motion to suppress and to terminate the proceedings was denied by Judge Maltin who then proceeded to hear the alien on his application for voluntary departure pursuant to Section 244(e) of the Act, 8 U.S.C. 1254(e).

At the close of the deportation hearing the Immigration Judge entered a decision finding the alien deportable as charged, and ordered that he be deported from the United States to El Salvador (R. 41-45, A. 43-38). On April 30, 1975 the alien by his counsel appealed the order of the Immigration Judge to the Board (R. 40, A-39).

On appeal before the Board Melara contended that all the evidence introduced at his deportation hearing by the Service should have been suppressed as the fruit of an illegal interrogation and arrest; that the Government wrongfully failed to make the arresting officer available at the hearing; and that the Immigration Judge illegally abused his discretion by denying voluntary departure solely because of (i) the refusal of the respondent's counsel to abandon the right of appeal, and (ii) the fact that the respondent had declined to make a pre-hearing agreement with respect to voluntary departure (R. 8-20, 22-39, 40).

On March 26, 1976 the Board rejected the alien's contentions and dismissed the appeal (R. 2-7, A. 40-45). Although the Board noted that Service's officers have the power under Section 287(a) of the Act, 8 U.S.C. § 1357(a), to question a person believed to be an alien as to his right to be in the United States the Board stated that it was unnecessary to reach the broad issue raised by counsel regarding the legality of Melara's initial questioning by a Service officer. The Board noted that the evidence relating to Melara's deportability was not obtained from the alien and that the Service was not precluded from using information in its official records.

The Board, noting that the privilege of voluntary departure cannot be conditioned upon a waiver of the right to appeal, found independently upon its own review of the record of proceedings that Melara should not be accorded the privilege of voluntary departure. This finding was specifically based upon the manner of his entry *and* his repeated flouting of the immigration laws.

Relevant Statutes

Immigration and Nationality Act, Section 242 (8 U.S.C. § 1252):

* * * * *

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and as authorized by the Attorney General, shall make determinations including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present. . . . In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. . . . Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence.

* * * * *

Immigration and Naturalization Act, Section 291 (8 U.S.C. § 1361).

. . . In any deportation proceeding under chapter 5 against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, but in presenting such proof he shall be entitled to the production of his visa or other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry in the custody of the Service. If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.

ARGUMENT

The alien was afforded his Fifth Amendment right of due process in the deportation proceedings below.

The petitioner has consistently, both in the administrative proceedings below and in this petition for judicial review, rested his entire case on the unsupported premise that his initial questioning by the Service and his subsequent apprehension was the result of a warrantless and illegal arrest.* Relying on this supposition the petitioner seeks to terminate any deportation proceedings against him and overturn his deportation order on the basis that the evidence supporting the finding of deportability was obtained in violation of the Fourth Amendment and is inadmissible under the "fruit of poisonous tree" doc-

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* As noted *infra* the Board found that independent evidence supported the finding of deportability and therefore did not reach the issue of Melara's initial apprehension. Nontheless, it appears from Melara's own testimony that upon being approached for street directions he voluntarily gave the immigration officer sufficient information, including his nationality and manner of illegal entry, to cause the arrest of this alien. From the limited record before this Court there does not appear to have been an illegal arrest such as petitioner claims. See *United States* v. *Martinez, et al.* — U.S. — (1976), 44 U.S.L.W. (July 6, 1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 n.9 (1975); *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1972); *Cheung Tin Wong* v. *Immigration and Naturalization Service*, 468 F.2d 1123 (D.C. Cir. 1972); *Au Yi Lau* v. *Immigration and Naturalization Service*, 445 F.2d 217 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971); *Yam Sang Kwai* v. *Immigration and Naturalization Service*, 411 F.2d 683 (D.C. Cir.), *cert. denied*, 386 U.S. 877 (1969).

trine.* Specifically, the alien charges that the Immigration Judge erred in his refusal to conduct a separate suppression hearing and erred by not requiring the Service to justify the legality of Melara's apprehension. On the basis of that erroneous conclusion Melara demands that a "flagrant" violation of the Fourth Amendment be assumed and that all evidence supporting the finding of his deportability should be "presumed" to be the direct result of an unlawful street arrest (Petitioner's Brief, pp. 7, 8, 14). It is respectfully submitted that the hearing below afforded the alien all of those constitutional and statutory rights to which he was entitled and that the order of the Board of Immigration Appeals was factually well-founded and legally sound.

A. The nature of the petitioner's arrest does not, of itself effect the validity of the deportation proceeding.

In the deportation proceedings below and in the alien's brief for judicial review, his sole contention has been that his arrest was illegal and therefore all the evidence which the Service produced in support of deportability should be suppressed. Although the Service did not introduce any statements or evidence taken from Melara at the time of his apprehension, or at any time thereafter, the alien demands that the independent evidence introduced by the Service must also be suppressed.

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* The recent case relied upon by the petitioner does not relate to on the street questioning by Service officers. See *United States* v. *Brignoni-Ponce, supra,* at 884 n.9. Furthermore, although the Court applied the exclusionary rule in *Brignoni* to the driver of the automobile who was charged with two *criminal* counts under 8 U.S.C. § 1324, nothing in that opinion remotely suggests that the application of the exclusionary rule would also be applied to the illegal entrant, passengers during a subsequent *civil* deportation hearing.

Quite simply, this premise is untenable. Despite his disclaimer that he is not seeking to suppress the "body" of an alien apprehended by the Service so that he must be necessarily set at liberty forever in the United States in an illegal status, it is submitted that this result as well as a further unwarranted delay of the deportation proceedings is precisely the objective which is sought in this action. Furthermore, the adoption of Melara's expansive reading of the exclusionary rule is not warranted in civil deportation proceedings.

Although the Government does not dispute that the Fourth Amendment protects aliens as well as citizens, it is respectfully submitted that the judicially created execusionary rule first enunciated in *Weeks* v. *United States*, 232 U.S. 383 (1913), only precludes the use of evidence obtained in violation of the Fourth Amendment in *criminal* proceedings against the subject of an illegal search and seizure and is inapplicable to deportation proceedings such as the case at bar.* Deportation proceedings have consistently been held to be *civil* in nature and not the equivalent of criminal prosecutions. *Woodby* v. *Immigra-*

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* The Board has in the past and pursuant to its supervisory powers (see Section 103 of the Act, 8 U.S.C. § 1103, 8 C.F.R. § 3.1) imposed upon the Service an *administrative* equivalent to the exclusionary rule in the deportation proceedings. See *Matter of Tsang*, Interim Decision 2187 (B.I.A., February 16, 1973), *Matter of Perez-Lopez*, Interim Decision 2132 (B.I.A., March 8, 1972), *Matter of Tang*, 13 I & N Dec. 691 (B.I.A. April 22, 1971). Nonethe less, the Board, as reflected in its decision in this case, has consistently refused to impose the administrative equivalent of the exclusionary sanction where the evidence of deportability derives from pre-existing information contained in the Service's files. See *Matter of Yare*, Interim Decision 2272 (B.I.A. 1974). It is submitted that for the reasons noted *infra* this Court should not extend the judicially created exclusionary rule where the Board has in the past declined such action.

tion and Naturalization Service, 385 U.S. 276 (1966); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952); *Papapil* v. *Immigration and Naturalization Service*, 424 F.2d 6 (7th Cir.), *cert. denied*, 400 U.S. 908 (1970).

While an alien is entitled to due process and a full and fair hearing in the deportation proceedings, *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1949), the full panoply of procedural and substantive safeguards which are provided in a criminal proceeding are not required at a deportation hearing. See *Chen* v. *Immigration and Naturalization Service*, — F.2d —, Docket No. 76-1065 (1st Cir., decided July 13, 1976); *Chavez-Raya* v. *Immigration and Naturalization Service*, 519 F.2d 397 (7th Cir. 1975) (failure to give *Miranda* warnings does not render the alien's statements made during custodial interrogation inadmissible in deportation proceedings); *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149 (1923) (presumption of innocence does not apply in immigration proceedings); *Nason* v. *Immigration and Naturalization Service*, 370 F.2d 865 (2d Cir. 1967) (no right to counsel at preliminary investigation before immigration investigators); *Bridges* v. *Wixon*, 144 F.2d 927 (9th Cir.) *reversed on other gnds.*, 326 U.S. 135 (1945) (double jeopardy inapplicable to deportation proceedings); *Matter of Laqui*, 13 I & N Dec. 232 (cases cited therein at 233). See also *Laqui* v. *Immigration and Naturalization Service*, 422 F.2d 807 (9th Cir. 1970).

Furthermore, the extension of the application of the exclusionary rule runs counter to the analytical framework adopted by the Supreme Court in *United States* v. *Calandra*, 414 U.S. 338 (1974), wherein the Court described the exclusionary rule as,

> "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its

> deterrent effect, rather than a personal constitutional right of the party aggrieved. Despite its broad deterrent purposes, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought to be most efficaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement. Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use evidence to *incriminate* the victim of the unlawful search. [Citations omitted]. This standing rule is premised on a recognition that *the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search.*" (Emphasis added) *Id.* at 348.

In declining to apply the exclusionary rule to grand jury proceedings the Court noted that the broad dictum of *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), often relied upon for extending the exclusionary rule, had been substantially undermined by later cases. *Id.* at 352-353 n.8.

More recently the Court has again examined the propriety of extending the judicially created exclusionary rule to a federal civil proceeding wherein the evidence had been obtained in an unconstitutional search by state authorities. *United States et al.* v. *Janis*, — U.S. —, (1976), 44 U.S.L.W. 5303 (decided July 6, 1976). While

Janis involved an attempt to extend the exclusionary rule to an intersovereign situation the Court in declining to further extend the rule noted that it had never applied the exclusionary rule "to exclude evidence from a civil proceeding, federal or state." *Id.* at 5307. Although the consequences of deportation may be severe in individual cases, *Costello* v. *Immigration and Naturalization Service*, 376 U.S. 120, 128 (1964) the purpose of expulsion by deportation is not to penalize the alien for a criminal offense but rather to administratively regulate the entry of aliens into the United States. See *Oliver* v. *United States Department of Justice*, 517 F.2d 426 (2d Cir. 1975); compare *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965) (forfeiture was clearly a penalty for

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* Judicial support for refusing to further extend the exclusionary rule to civil deportation proceedings is also found in the dissenting opinion by Justice Stewart in *Janis* in which he noted that the tax wagering statutes in question operation in an area permeated with *criminal* statutes and impose liability on a group inherently suspect of *criminal* activities. Justice Stewart noted that the tax provisions in *Janis* are intended not merely to raise revenue but also to assist law enforcement authorities in enforcing *criminal penalties* for unlawful wagering activities. It therefore appears that the judicial extension of the exclusionary rule even under the broadest interpretation would at best only be extended to civil proceedings which serve as an adjunct to the enforcement of *criminal penalties. Id* at 5312.

Unlike the wagering provisions in *Janis* the Immigration and Nationality Act is civil and primarily regulatory in nature. See *Matter of Yau*, Interim Decision #2272 decided by the Board on March 19, 1974. The immigration laws do not impose liability on a group inherently suspect of *criminal activities* but rather attempt merely to regulate the immigration of aliens into the United States in accordance with the structured system created by Congress. Compare *California* v. *Byers* 402 U.S. 424 (1971) (extension of the Fifth Amendment privilege against self incrimination is unwarranted in the context of an essentially non-criminal and regulatory state statute).

the criminal offense and was quasi criminal in nature). Accordingly, the judicial extension of the exclusionary rule to a deportation proceeding especially to the extent demanded by the petitioner is clearly unwarranted in this civil proceeding. See also *Stone* v. *Powell*, — U.S. — (1976), 44 U.S.L.W. 5313 (decided July 6, 1976) (concurring opinion of Chief Justice Burger at 5323). See also *N.L.R.B.* v. *South Bay Daily Breeze*, 415 F.2d 360, 364 (9th Cir. 1969).

Even if the exclusionary rule of criminal proceedings was applied to the instant case it is submitted that the petitioner's arguments must fail. It is well-setled that despite an irregularity in the arrest, an assumption which is not established in the record or reached by the Board's decision, the mere fact that the authorities may have obtained the body of the alien illegally does not render the deportation proceeding null and void or render the proceeding the "fruit of the poisonous tree". *Avila-Gallegos* v. *Immigration and Naturalization Service*, 525 F.2d 666 (2d Cir. 1975); *La Franca* v. *Immigration and Naturalization Service*, 413 F.2d 686 (2d Cir. 1969); *Guzman-Flores* v. *Immigration and Naturalization Service*, 496 F.2d 1245, 1248 (7th Cir. 1974). As the Board noted in its decision, the Service records supporting Melara's finding of deportability came from the Service files and were not obtained from the alien. The Service did not rely upon any statement taken or any evidence seized at the time of Melara's arrest to establish deportability. The fact that the Service was already in possession of those documents as a result of Melara's previous deportation clearly distinguishes this case from those criminal proceedings where the Government neither had sufficient evidence to cause an arrest nor maintained in its possession pre-existing evidence to prove its charges against the individual. It is submitted that even under the traditional test in *Wong Sun* v. *United States*, 371 U.S. 471 (1963),

the previously existing documentation which had been in the Service's possession since his first illegal sojourn, and long before his apprehension in this second and illegal entry, properly distinguishes this case from those criminal cases where the Government's evidence comes into its possession solely as a direct result of the illegal arrest.

Melara states that the *only* way the Government could have had access to the previously existing immigration records would be through the leads provided by Service officers which he alleges were unlawfully obtained from the petitioner. He thereby ignores the record in this case which reflects that at the deportation hearing he voluntarily gave his name. Further, his invocation of the Fifth Amendment privilege would not have insulated him from furnishing new fingerprints or handwriting exemplars which together with his name could have been processed through Government record indices to obtain relating immigration files and verify whether or not a previous immigration record existed. We therefore disagree with the petitioner's contention that the Service could not substantiate its case against Melara without the use of allegedly tainted and illegal evidence. *Compare United States* v. *Cole*, 463 F.2d 163, 173-174 (2d Cir.), *cert. denied*, 409 U.S. 942 (1972); *Virgin Islands* v. *Gereau*, 502 F.2d 914, 927-28 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); *United States* v. *Falley*, 489 F.2d 33, 40-41 (2d Cir. 1973). It is submitted that the Service records, having been independently maintained in the Government's possession, were admissible evidence upon which the Service could sustain its charge of deportability. See *Huerta-Cabrera* v. *Immigration and Naturalization Service*, 466 F.2d 759, 751-762 (7th Cir. 1972), wherein the previously existing Service records were described as "substantial and untainted" thereby supporting the order of the Board.

Melara also seeks to persuade this Court, on the basis of public policy, to extend the exclusionary rule and foreclose the Government from ultilizing previously existing and independent evidence to substantiate a charge of deportability. The alien demands this expensive coverage in a case where the Government has not shown any interest in obtaining a criminal conviction and has merely attempted to effect the removal of an alien illegally residing in the United States until such time as that alien is able to obtain a legal admission as an immigrant. It is submitted that the concurring opinion of Chief Justice Burger in *Stone* v. *Pollack*, *supra* at 5323, is noteworthy in regard to Melara's argument:

> "Despite its avowed deterrent objective, proof is lacking that the exclusionary rule, a purely judge created device based on 'hard cases,' serves the purpose of deterrence. Notwithstanding Herculean efforts, no empirical study has been able to demonstrate that the rule does in fact have any deterrent effect. In the face of dwindling support for the rule some would go so far as to extend it to *civil* cases. *United States* v. *Janis*, *supra*.
>
> To vindicate the continued existence of this judge made rule, it is incumbent upon those who seek its retention—and surely its extension—to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law."

It is respectfully submitted that no interest, other than an illegal alien's desire to delay his deportation and continue illegal employment in the United States, will be served by either the separate suppression hearing demanded by the petitioner or the extension of the exclu-

sionary rule into purely civil fact finding proceedings.* The former will merely enable many if not all illegal and deportable aliens to further delay their proper expulsion from the United States. See *Avila Gallegos, supra* at 666 n.1. The latter would merely encourage aliens charged with deportability to stand mute at their hearings after alleging an illegal arrest causing the taxpayers, through the Service, to call agency personnel and other persons to testify at deportation hearings in order to establish deportability.** Further under the petitioner's application of the exclusionary rule in any case where a Fourth Amendment violation did occur the Government, despite its plenary power over immigration, see *Kliendienst* v. *Mandel*, 408 U.S. 753 (1972), could well be precluded from obtaining the removal of even the most antisocial or dangerous alien who entered the United States illegally. If the interpretation proposed by Melara were accepted, aliens could permanently immunize themselves from deportation by showing that their initial apprehension by an immigration officer was defective. *Arbiol* v. *Immigration and Naturalization Service*, 73 Civ. 344 (March 6,

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* To the contrary substantial reasons for not invoking the exclusionary rule are described in the concurring opinions in *Brignoni-Ponce*. See concurring opinions of Burger, C.J. and White, J.

** See *Matter of Laqui*, 13 I & N Dec. 232, 235:

> "Effective enforcement of the immigration laws requires that the true facts be established with a minimum of delay. If the subject of an inquiry is permitted to remain mute, the Service must resort to other sources to establish the facts, and this usually takes additional time, trouble, and expense. We see no valid reason to impose on the Service this extra burden which confers no corresponding legitimate benefit on the alien or any one else. Delay as an end in itself, whether achieved by obstructionism or dilatory tactic, cannot in our view be a legitimate objective."

1973; Frankel, *J.*). No such absurd result is required or contemplated by the Act of the Constitution.*

B. The Board of Immigration Appeals properly found the alien deportable.

As the Board correctly held the documents introduced by the Service and the failure of the alien to sustain his burden under Section 291 of the Act, 8 U.S.C. § 1361, to show the time, place, and manner of his entry into the United States, constituted clear, convincing and unequivocal evidence of Melara's deportability.** Similarly in *Vlisidis* v. *Holland*, 245 F.2d 812 (3rd Cir. 1957), the aliens were sworn in before an Immigration Judge, identified themselves, and thereafter refused to testify or identify various documents which the Service introduced

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* Nor do the administrative decisions cited by the petitioner lend any support to his demand for a *separate* suppression hearing. Section 242 (b), 8 U.S.C. § 1252 (b) describes the "sole and exclusive procedure for determining deportability". There is no reason why Melara's motion like all other ancillary matters and applications should not be heard in the same administrative proceeding. See 8 C.F.R. § 242.15, 242.17.

** The record reflects that Melara testified with respect to his alienage and deportability on two separate occasions during the deportation hearing. Melara fully described his deportability and alienage in support of his application for voluntary departure. Under current administrative regulations this testimony cannot be utilized to establish deportablility. 8 C.F.R. § 242.17 (d). On the other hand Melara also described, on advice of counsel, that information which he gave the Service investigator prior to his arrest on April 7, 1975 were the responses elicited by the Service's trial attorney. Despite counsel's belated attempt to suppress the responses elicited by the Service Trial Attorney, we do not concede that this testimony must be precluded from establishing deportability in the administrative hearings. Nontheless the Board found sufficient evidence to support its findings without the ultilization of this testimony.

into evidence and which bore the names of the aliens. On review by the Court of Appeals the aliens, deserting crewmen, claimed that the Immigration Judge had penalized them by drawing an unfavorable inference against them because they had invoked the Fifth Amendment privilege against self-incrimination when asked to testify about their origin, citizenship, residence in this country, or the documents presented in evidence.* Referring to the official Service records introduced in evidence the Court stated that there was no valid objection to the use of such evidence where the alien whose name appears on the Service document is afforded the opportunity to impeach it if he so desires. The Court further stated that no inference need be drawn from the refusal of the alien to identify the document in order to make it admissible. Rather, its admissibility derived from its apparent regularity and official character. The Court stated that the similarity of names between that given by the alien at the hearing and that contained on the Service records justified the inference that the respondent at the deportation hearing was the deserting seaman identified in the records. Under those circumstances the Court in *Vlisidis* found no prejudice in the alien's hearing despite the invocation of the privilege. The essential fact of alienage had been established quite apart from that action and 8 U.S.C. § 1361 thereafter required the alien to justify his presence in the United States. See also *DeLucia* v. *Flagg*, 297 F.2d 58, 61 (7th Cir. 1962). Similarly, in Melara's case both alienage and deportability have been properly established through the introduction of Service records and the operation of 8 U.S.C. § 1361.

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* 8 U.S.C. § 1282(c) provides that certain deserting crewmean may be guilty of a misdemeanor for their willful failure to depart.

C. The Board of Immigration Appeals did not abuse its discretion in denying the alien the privilege of voluntary departure.

The petitioner requests that this Court substitute its judgment for that of the Board and reverse the Board's discretionary determination that the privilege of voluntary departure was not warranted in this case. Initially we note that the Board on appeal independently reviewed Melara's record and independently concluded, consistent with prior case law and administrative decisions, that the alien was ineligible for that privilege. That discretionary decision was based not only on the manner of his *second* illegal entry, as Melara seems to suggest in an apparent misreading of the Board's decision but also upon his *repeated* violation of the immigration laws. See *Gil* v.*Del Guerioic*, 246 F.2d 553 (9th Cir.), *cert. denied*, 355 U.S. 863 (1957); *Tupacyupanqui-Marin* v. *Immigration and Naturalization Service*, 447 F.2d 603 (7th Cir. 1971); *Matter of Rojas*, Interim Decision 2444 (B.I.A. 1952); *Matter of M*, 4 I&N Decisions 626 (B.I.A. 1952). The record in the case reflects that Melara had previously entered the United States as a nonimmigrant visitor on January 16, 1971 and after a hearing was found deportable as an overstay under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2). Although he was granted until September 15, 1972, and subsequently until December 1, 1972, to effect his voluntary departure he did not exercise that privilege in a timely fashion. The record also reflects that he made a surreptious entry across the international border and apparently paid smugglers to effect that entry. In addition, the record reflects that Melara has continuously engaged in illegal employment while residing in this country. See *Noel* v. *Chapman*, 508 F.2d 1023 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975) (relating to national interests in pro-

tecting domestic labor). The combination of these factors clearly sets forth a rational basis upon which to deny this discretionary privilege to an alien who was previously granted and ignored that privilege. See *Fan Wan Keung* v. *Immigration and Nauralization Service*, 434 F.2d 301 (2d Cir. 1970). Contrary to whatever interpretation Melara chooses to place on his reading of the Immigration Judge's decision it is the independent finding and conclusion of the Board's final order of deportation which is binding upon the Service and which is the sole decision to be reviewed by this Court. See 106(a) of the Act, 8 U.S.C. § 1105a(a); 8 C.F.R. § 3.1(d)(2) (as to those opinions which constitute a *final order* of deportation in the administrative proceedings below and which are reviewable in a petition for review). Inasmuch as the Board specifically stated its rationale and stated that the grant of voluntary departure could not be conditioned upon the waiver of a right to appeal we find Melara's contentions without merit.

Should Melara obtain the requisite qualifications for legal immigration into the United States, we submit that his proper recourse is to request permission to reapply following deportation. See Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17). Contrary to petitioner's unfounded statement that such permission is often unattainable, should Melara ever choose to abide by the laws of this country and seek legal entry he will have every opportunity to demonstrate the equities in his case which might support his request. See *Matter of Acosta*, Interim Dec. 2204 (May 17, 1973); *Matter of Tin*, Interim Decision 2207 (June 4, 1973).

The petitioner has not in this action established that the Board's decision denying voluntary departure was made "without a rational explanation, inexplicably de-

parted from established policies or rested on an impermissible basis". *Wong Wing Hang* v. *Immigration and Naturalization Service*, 360 F.2d 715, 719 (2d Cir. 1969). Accordingly this Court should not substitute its judgment for that of the Board and reverse a valid administrative determination.

CONCLUSION

The petition for review should be denied.

September 1976
New York, New York

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1976— 614—350—187

Form 280 A-Affidavit of Service by Mail
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State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that s he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

13th day of **September**, 1976 s he served ~~X~~ **2** copy**s** of the within **govt's brief**

by placing the same in a properly postpaid franked envelope addressed:

Fried, Fragomen & DelRey P.C.
515 Madison Ave.
NY NY 10022

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

13th day of **September**, 1976

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977